

Merom Brachman, *Chairman*
Megan C. Kelley, *Vice Chair*
Bruce E. Bailey
Julie A. Rutter
Elizabeth E. Tracy
Mark A. Vander Laan

Paul M. Nick
Executive Director



OHIO ETHICS COMMISSION
William Green Building
30 West Spring Street, L3
Columbus, Ohio 43215-2256
Telephone: (614) 466-7090
Fax: (614) 466-8368

www.ethics.ohio.gov

April 19, 2019

Roshani de Soyza Hardin
Chief Counsel
Office of the City Solicitor
801 Plum Street, Suite 214
Cincinnati, Ohio 45202-1985

Dear Ms. Hardin:

On April 15, 2019, the Ohio Ethics Commission received your letter requesting an advisory opinion. You asked a question on behalf of the Vice Mayor of the City of Cincinnati (city).

Key Facts

Your request letter and its enclosures explain:

Open Meetings Violation Lawsuit

- A private citizen filed a lawsuit alleging that five of the nine members of city council (five council members) had violated the Ohio Open Meetings Act by discussing and deciding matters pertaining to city business through group text messages, e-mails, and a conference call outside of a public meeting.
- Initially, the city solicitor's office represented the five council members.
- Subsequently, city council appropriated \$150,000 for two law firms to serve as special counsel.¹ One firm would represent the council members in their official capacities and another firm would represent the city.
- Before the city solicitor's office resumed representing the five council members, the combined costs for the legal services that the two law firms and an outside technical vendor had provided totaled approximately \$75,000.

Settlement Agreement

- The claims in the lawsuit were resolved in a settlement agreement between the parties.

- The five council members admitted violating the Open Meetings Act and the judge overseeing the settlement directed the city to pay the following penalties:
 - \$1,000 as a statutory forfeiture pursuant to R.C. 121.22.
 - \$10,000 as a statutory forfeiture pursuant to R.C. 149.351, because one council member had deleted his text messages.
 - Attorney fees totaling \$90,000 pursuant to R.C. 121.22 and R.C. 149.351.

City's Financial Obligations

- The city's total expenses for outside legal services and the penalties specified in the settlement agreement were \$176,000.
- The vice mayor submitted a motion to city council stating that city taxpayers should not be responsible for these expenses and that the five council members should pay the \$176,000. The motion is non-binding, but the vice mayor intends to introduce an ordinance if the motion passes.

Question and Brief Answer

You have asked if the five council members are prohibited from voting on the motion and related procedural motions that arise under the city council's parliamentary process.

As explained below, the five council members are prohibited from voting, participating in discussions or deliberations, or otherwise using their authority or influence, formally or informally, in matters regarding the motion, a resulting ordinance, and any related procedural motions that arise under the city council's parliamentary process that affect the motion's passage, tabling, or non-passage.

R.C. 102.03(D) and (E)—Conflict of Interest Restrictions

City council members are subject to R.C. 102.03(D) and (E),² which read:

- (D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

- (E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

R.C. 102.03(D) prohibits public officials from using the authority or influence of their public positions to secure a thing of value for themselves or any other person or entity.³ By contrast, R.C. 102.03(E) does not require that public officials use the authority or influence of their public positions to secure a thing of value.⁴ Rather, R.C. 102.03(E) prohibits a public officials from merely soliciting or accepting an improper thing of value.⁵ The application of the Ethics Laws is dependent upon the facts and circumstances of each individual situation.⁶

The term "anything of value" is defined to include money and every other thing of value.⁷ The beneficial or detrimental economic impact that results from a public agency's legislative decision is a thing of value.⁸ Any action or decision of city council affecting the lawsuit and the payment of its resulting costs would directly affect the financial interests of the five city council members.

Conflicts of Interest in Legal Matters

The Ethics Commission has addressed how the Conflict of Interest provisions of the Ethics Law restrict the actions of public officials with an interest in legal interests pending before their own public agency.

Precedent--Advisory Opinion No. 90-013

In Advisory Opinion Number 90-013, the Ethics Commission addressed the issue of a port authority board member who had filed a lawsuit against the city that had created the port authority seeking to quiet title to a piece of city property that it leased to the port authority.

The board member's lawsuit was dismissed; afterwards, the city and port authority considered filing a lawsuit against the board member and other similarly situated landowners to quiet title to the same piece of property. The Commission determined that the board member was not prohibited from continuing to serve on the port authority's board even though the board member had been the plaintiff in a lawsuit involving the city property and could potentially become a defendant in a lawsuit brought by the city and port authority involving the same property.

However, the Commission also determined that a port authority decision to pursue the lawsuit would definitely and directly affect the board member's private financial interests. The Commission explained that this definite and direct benefit or detriment to the board member's financial interests would impair his objectivity and independence of judgment with regard to his duties as a port authority board member. The Commission also recognized that the board member would be able to use his board position to influence the other board members to decide matters involving the lawsuit in his favor.

Accordingly, the Commission determined that the board member was prohibited from voting, participating in discussions or deliberations of the port authority, or otherwise using the authority inherent in his official position, formally or informally, with regard to either a potential or pending lawsuit.

The conclusions in Advisory Opinion No. 90-013 are included as if restated here, but this opinion will more fully discuss the portions that are most relevant to your question.⁹ A copy of that opinion has been enclosed for your reference

Precedent-- Informal Opinion 2003-INF-0910-2

In Informal Opinion 2003-INF-0910-2, the Ethics Commission addressed the issue of a member of the Hamilton County (County) Board of Commissioners (Board), Todd Portune, who had filed a taxpayer's action against the Cincinnati Bengals, the NFL and its member teams seeking damages arising out of the County's involvement in the construction and lease of the Paul Brown Stadium. Mr. Portune filed his taxpayer action after the Board declined to pass a resolution for the County to seek damages from the same parties and after the County Prosecutor declined to pursue the claims. The County Board subsequently considered appointing special counsel to evaluate the claims that Mr. Portune had made in his taxpayer's action.

The Ethics Commission recognized that because Mr. Portune would recover his costs, including reasonable attorney fees, only if the court determined that the County was entitled to the relief that he sought in his taxpayer's lawsuit, the County Board's decision to appoint special counsel would definitely and directly affect his private financial interests.

Accordingly, the Commission determined that Mr. Portune was prohibited from voting, participating in discussions or deliberations of the County Board with respect to its decision to appoint special counsel and any future motions related to the claims.

The conclusions in Informal Opinion 2003-INF-0910-2 are included as if restated here, but this opinion will more fully discuss the portions that are most relevant to your question. A copy of that opinion has been enclosed for your reference

Application of Precedent

The private financial interests of the five council members would be definitely and directly affected by either the passage or non-passage of the vice mayor's motion and its resulting ordinance. A decision of city council that the five council members, rather than the city, should pay the \$176,000 would result in a definite and direct financial detriment for the five council members. Moreover, a decision of the city council that the city, rather than the five council members, should pay the \$176,000 also would result in a definite and direct financial benefit for the five council members.

Accordingly, the five council members are prohibited from voting, participating in discussions or deliberations, or otherwise using their authority or influence, formally or informally, in matters regarding the motion, a resulting ordinance, and any related procedural motions that arise under the city council's parliamentary process that affect either the motion's passage, tabling, or non-passage.

This opinion represents the views of the undersigned, based on the facts presented and the precedent of the Commission. It is limited to questions arising under Chapter 102, and Sections 2921.42 and 2921.43 of the Revised Code, and does not purport to interpret other laws or rules. Please contact this office again if you have any other questions or if you wish to request reconsideration of this opinion under OAC 102-3-07.

Sincerely,



John Rawski
Staff Advisory Attorney

Enclosure: Advisory Opinion Number 90-013
Informal Opinion 2003-INF-0910-2

The Ohio Ethics Commission Advisory Opinions referenced in this opinion are available on the Commission's Web site: www.ethics.ohio.gov.

¹ City Ordinances 290-2018 and 291-2018.

² Ohio Ethics Commission Advisory Opinions No. 89-008 and 90-008.

³ Adv. Ops. No. 84-013 and 89-006.

⁴ Adv. Op. No. 90-004.

⁵ Adv. Op. No. 86-003.

⁶ Adv. Ops. No. 90-004 and 91-002.

⁷ R.C. 1.03 and R.C. 102.01(G).

⁸ Adv. Ops. No. 85-012, 90-002, and 90-012.

⁹ See R.C. 102.08 (when the Ethics Commission renders an advisory opinion relating to a special set of circumstances, the person to whom the opinion was directed or who was similarly situated may reasonably rely upon the opinion and shall be immune from criminal prosecutions, civil suits, or actions for removal from his public office or employment for a violation of the Ethics Laws based on facts and circumstances covered by the opinion, if the opinion states there is no violation of the Ethics Laws).